No. 14-1504

In The
Supreme Court of the United States

ROBERT J. WITTMAN, *et al.*,

Appellants,

v.

GLORIA PERSONHUBALLAH, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

BRIEF OF VIRGINIA STATE BOARD OF ELECTIONS APPELLEES

MARK R. HERRING
Attorney General
of Virginia

CYNTHIA E. HUDSON
Chief Deputy
Attorney General

TREVOR S. COX
Deputy Solicitor General

MATTHEW R. MCGUIRE
Assistant Attorney General

STUART A. RAPHAEL*
Solicitor General
of Virginia
*Counsel of Record

900 East Main Street
Richmond, VA 23219
(804) 786-7240
sraphael@oag.state.va.us

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The first question below was added by the Court. Questions 1-4 in Appellees' Jurisdictional Statement are restated as questions 2 and 3 below.

1. Whether Appellants lack standing because none reside in or represent the only congressional district whose constitutionality is at issue in this case.

2. Whether the district court committed clear error in finding that race was the predominant factor in redrawing CD3—triggering strict scrutiny—when the evidence, viewed in the light most favorable to Plaintiffs, supported the court's conclusion that the legislature relied on a 55% racial floor to increase the black voting age population (BVAP) in CD3 from 53.1% to 56.3%, ostensibly to obtain preclearance from the Department of Justice under § 5 of the Voting Rights Act.

3. Whether the district court committed clear error in finding that the legislature's use of race failed strict scrutiny because a 55%-BVAP floor was not needed to protect the ability of African-American voters in CD3 to elect a candidate of choice.

CHANGE IN PARTY NAMES

Appellants' opening brief overlooks the change in party names identified by Appellees on July 22, 2015. The following Appellees, defendants in the district court, were sued in their official capacities as members of the Virginia State Board of Elections:

- Charlie Judd, Chairman of the Virginia State Board of Elections;
- Kimberly Bowers, Vice-Chair of the Virginia State Board of Elections; and
- Don Palmer, Secretary of the Virginia State Board of Elections.

They no longer serve in those capacities. The current officials are:

- James B. Alcorn, Chairman of the Virginia State Board of Elections;
- Clara Belle Wheeler, Vice-Chair of the Virginia State Board of Elections; and
- Singleton B. McAllister, Secretary of the Virginia State Board of Elections.

Under Rule 35.3, appellees Alcorn, Wheeler, and McAllister have been substituted for Judd, Bowers, and Palmer.

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INTRODUCTION

Eight of Virginia's eleven members of the United States House of Representatives—intervenor-defendants below—have appealed the judgment of the three-judge district court invalidating Virginia's Third Congressional District (CD3) as a racial gerrymander. After a two-day trial, the court found 2-1 that the Virginia General Assembly applied a 55%-BVAP (Black Voting Age Population) floor to increase the percentage of African-American voters in CD3, from 53.1% to 56.3%, ostensibly to obtain preclearance from the Department of Justice under § 5 of the Voting Rights Act (VRA).[1] Applying strict scrutiny, the district court concluded that a 55%-BVAP floor was not narrowly tailored to avoid retrogression in CD3, which was already a "safe" district for black voters. Although the Commonwealth defended the Enacted Plan at trial, in light of the district court's factual findings, the Commonwealth elected not to appeal.

At least one Intervenor, Representative J. Randy Forbes (R-CD4), has standing to appeal. The court's remedial plan changes his district from a "safe" incumbent seat into a competitive, majority-Democratic district. That sufficiently risks his reelection chances to give him Article III standing.

But the judgment should be affirmed. It is settled that the evidence on appeal must be viewed in the

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[1] 52 U.S.C. § 10304.

light most favorable to Plaintiffs, who prevailed at trial, and that the district court's factual findings can be set aside only for clear error. The district court did not commit clear error in finding that racial considerations predominated in drawing CD3, thereby triggering strict scrutiny. And the use of a fixed racial floor was not narrowly tailored to the goal of protecting the rights of African-American voters in CD3.

STATEMENT OF THE CASE

1. CD3 is the only majority-minority district among Virginia's eleven congressional districts. When it was created as part of Virginia's 1991 redistricting plan, CD3 had a BVAP of 61.17%.[2] DOJ precleared the plan under § 5 of the VRA in February 1992.[3]

But in 1997, a three-judge court in *Moon v. Meadows* invalidated CD3 as a racial gerrymander.[4] Applying this Court's decisions in *Shaw v. Reno* (*Shaw I*)[5] and *Miller v. Johnson*,[6] the court in *Moon* found the evidence "overwhelming that the creation of a safe black district predominated in the drawing

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[2] Joint Appendix (JA) 427 (PX-50).

[3] *Moon v. Meadows*, 952 F. Supp. 1141, 1144 (E.D. Va.), *aff'd mem.*, 521 U.S. 1113 (1997).

[4] *Id.*

[5] 509 U.S. 630 (1993) (*Shaw I*).

[6] 515 U.S. 900 (1995).

of the boundaries."[7] The "bizarre" shape and "racial characteristics" of the district supported that conclusion.[8]

In response to *Moon*, the General Assembly redrew CD3 in 1998, omitting the cities of Portsmouth and Petersburg.[9] The BVAP in revised CD3 dropped from 61.17% to 50.47%.[10] DOJ precleared that plan,[11] and CD3 was not challenged.

Following the decennial census, the General Assembly redrew Virginia's congressional districts in 2001.[12] The redistricting plan shifted a number of black voters from CD4 into CD3 and CD5.[13] As a result, the BVAP in CD3 increased to 53.1%.[14] DOJ precleared that plan,[15] and CD3 was not challenged.

2. The 2010 census revealed that CD3 was underpopulated by 63,976 citizens.[16]

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[7] 952 F. Supp. at 1145.

[8] *Id.* at 1147 (citing *Shaw I*, 509 U.S. at 646).

[9] JA 581 (Tr. 48:13-15).

[10] JA 427 (PX-50).

[11] JA 580-81 (Tr. 48:8-12).

[12] *Hall v. Virginia*, 385 F.3d 421, 424 (4th Cir. 2004).

[13] *Id.*

[14] JA 210-11 (PX-27 at 14); JA 427 (PX-50).

[15] *Hall*, 385 F.3d at 424 n.1.

[16] JA 116 (PX-13 at 12:3-8); JA 210 (PX-27 at 14); JA 590, 856 (Tr. 58:17-22, 381:23-382:2).

In advance of State redistricting under the decennial census, the DOJ, on February 9, 2011, issued its Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act.[17] The Guidance advised that "[i]n determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment."[18] Rather, the "determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district."[19]

On February 27, 2011, the General Assembly commenced a special session on redistricting.[20] The House of Delegates was controlled by Republicans, the Senate by Democrats.[21]

The sole author of what became the congressional redistricting plan at issue here was Delegate Bill Janis (R-Henrico),[22] who introduced his plan on April 6, 2011.[23] As finally approved, Janis's plan increased the total black population in CD3 from 56.8% to 59.5%, and it increased the BVAP from 53.1% to

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[17] 76 Fed. Reg. 7,470 (Feb. 9, 2011) (JA 547).

[18] *Id.* at 7,471 (JA 554).

[19] *Id.*

[20] JA 105 (PX-8 at 5).

[21] *See* JA 574 (Tr. 40:10-19).

[22] JA 568-69 (Tr. 34:6-38:6); JA 360-61 (PX-43 at 14:1-15:3).

[23] JA 107 (PX-8 at 7).

56.3%.[24] Janis's plan, among other things, returned to CD3 the City of Petersburg, which had been shifted to CD4 in response to *Moon*.[25]

On April 12, 2011, Janis described his methodology to fellow delegates, saying that he used "several criteria."[26] "First, and most importantly," the districts had "to comply with the one-person-one-vote rule."[27] Second, "the districts were drawn to conform with all mandates of federal law, and, most notably, the Voting Rights Act. The Voting Rights Act mandates that there be no retrogression in minority voter influence in the 3rd Congressional District."[28] "Third, the districts were drawn to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections."[29] The districts were based "on the core of the existing congressional districts with the minimal amount of change or disruption to the current boundary lines, consistent with the need . . . to ensure that each district had the

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[24] JA 210 (PX-27 at 14).

[25] JA 580-81 (Tr. 47:14-48:22).

[26] JA 351 (PX-43 at 3:2).

[27] JA 351 (PX-43 at 3:3-7). As *Alabama Legislative Black Caucus v. Alabama* explained, meeting the "equal population goal" is simply a "background" requirement in any congressional redistricting, not a factor to be weighed against the use of race to determine if race predominates. 135 S. Ct. 1257, 1270 (2015).

[28] JA 351 (PX-43 at 3:16-22).

[29] JA 352 (PX-43 at 4:6-8).

right 727,365 benchmark."[30] Janis also tried to respect "the will of the electorate by not cutting out currently elected congressmen from their current districts nor drawing current congressmen into districts together."[31] "Wherever possible," Janis "attempt[ed] to keep together jurisdictions and localities, counties, cities and towns."[32] He said that his plan split "fewer jurisdictions" than the benchmark plan.[33] He added that his plan "[w]herever possible . . . seeks to preserve existing local communities of interest" and in some instances to "reunite such communities" fractured in earlier plans.[34]

Janis claimed to have spoken with all of the existing congressional delegation, and that "[b]oth Republican and Democrat members provided specific detailed and significant input in recommendations to how best to draw the lines for their districts."[35] He added that "each confirmed for me and assured me that the lines for their congressional district as they appear in this legislation conform to the recommendations that they provided" and "that they support the line of their congressional district" as drawn.[36]

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[30] JA 352 (PX-43 at 4:9-14).

[31] JA 352 (PX-43 at 4:15-18).

[32] JA 352 (PX-43 at 4:21-22).

[33] JA 352 (PX-43 at 5:1-2).

[34] JA 352-53 (PX-43 at 5:8-11).

[35] JA 353 (PX-43 at 5:16-19).

[36] JA 353 (PX-43 at 6:1-6).

In response to questioning about how CD3 was drawn, however, Janis said that the single most important factor was avoiding retrogression:

> And that's how the lines were drawn, and that was the *primary focus* of how the lines . . . were drawn . . . to ensure that there be no retrogression in the 3rd Congressional District.[37]

He explained that he "was most especially focused on making sure that the 3rd Congressional District did not retrogress in its minority voting influence."[38] Non-retrogression was "one of the paramount concerns" that was "nonnegotiable."[39]

Delegate Armstrong (D-Martinsville) asked Janis whether any functional voting analysis had been conducted to determine the percentage of minority voters actually needed in CD3 for black voters to elect a candidate of choice.[40] Janis did not identify any.[41] Armstrong then argued against the plan, explaining that it "is not enough to merely look at the minority population to determine if that is a minority majority district for voting purposes. You have to conduct the voting pattern analysis in order to determine what

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[37] JA 370 (PX-43 at 25:13-16) (emphasis added).

[38] JA 361 (PX-43 at 14:24-15:1).

[39] JA 370 (PX-43 at 25:8-10).

[40] JA 359 (PX-43 at 12:23-13:6).

[41] JA 359-62 (PX-43 at 13:7-14:10, 15:9-22).

that percentage is."[42] "And when you don't do the regression analysis . . . you can crack and pack, the slang terms used to either put too many minorities in a district or too few."[43]

Nonetheless, the House of Delegates approved Janis's plan by a vote of 71 to 23.[44]

The Senate Committee on Privileges and Elections then took up the plan, and a substitute plan proposed by Senator Mamie Locke (D-Hampton). Janis repeated the opening comments he had given on the House floor.[45] In response to questioning, Janis added that, while he had solicited each congressman's views about his own proposed district, he had not solicited an opinion "from any of them as to the entire plan in its totality . . . ."[46]

Senator Creigh Deeds (D-Charlottesville) asked Janis, "Do you have any knowledge as to how this plan improves the partisan performance of those incumbents in their own district?"—to which Janis replied: "I haven't looked at the partisan performance.

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[42] JA 389 (PX-43 at 47:4-8).

[43] JA 389 (PX-43 at 47:18-22).

[44] JA 391 (PX-43 at 49:14-17).

[45] *Compare* JA 449-53 (IX-9 at 4-9) *with* JA 351-54 (PX-43 at 2-6).

[46] JA 452, 456 (IX-9 at 9:6-7, 13:23-14:2).

It was not one of the factors that I considered in the drawing of the district."[47]

The Senate adopted Locke's plan instead of Janis's plan and transmitted Locke's plan to the House.[48]

In the House, Janis argued that his plan was superior to Locke's because of the "certainty" that his plan would obtain DOJ preclearance, while the Locke plan faced "uncertainty . . . particularly because it takes the 3rd Congressional District and retrogresses it" from a "56 percent minority voting district" "to a 40 percent minority voting district."[49]

The House rejected the Locke plan[50] and the House and Senate conferees were unable to resolve the deadlock.[51] Congressional redistricting was put off until 2012.

Before the 2011 special session concluded, however, the legislature approved redistricting plans for the Virginia Senate and House of Delegates.[52] Each of the twelve majority-minority House districts had a

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[47] JA 456 (IX-9 at 14:7-13).

[48] JA 464 (IX-9 at 25:25-26:1); JA 108 (PX-8 at 8).

[49] JA 398 (PX-45 at 7:13-8:20). The "56 percent" figure apparently referenced the total black population in CD3 (56.8%) in the Benchmark Plan created in 2001. *See* JA 427 (PX-50).

[50] JA 401 (PX-45 at 11:8-9).

[51] JA 108 (PX-8 at 8).

[52] 2011 Va. Acts Spec. Sess. I ch. 1.

BVAP of at least 55%.[53] In the floor debates surrounding that plan, several members indicated that black-majority districts required a BVAP of at least 55% in order to obtain preclearance under § 5.[54]

After the November 2011 general election, Republicans continued to control the House of Delegates and also won control of the Senate. Delegate Janis did not run for reelection, but his congressional redistricting plan was reintroduced in the 2012 session.[55] The House adopted that plan by a vote of 74-21.[56]

Before the final vote, Senator Locke protested that CD3 "has been packed" with African Americans, protecting incumbents in the surrounding districts but leaving African Americans in the First, Second, and Third Congressional Districts "essentially disenfranchised."[57] Senator McEachin (D-Richmond) agreed that the plan was "packing the 3rd Congressional District and deliberately denying minority voters the opportunity to influence congressional districts elsewhere."[58] He said that the plan violated the Voting Rights Act because the black-voter concentration "is

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[53] JA 517 (IX-13 at 26).

[54] *See* JA 527 (IX-30 at 13:23-24); JA 533 (IX-32 at 18:12-16); JA 534, 536 (IX-32 at 20:8-11, 22:6-12). *See infra* at 36-37.

[55] JA 108-09 (PX-8 at 8-9).

[56] JA 109 (PX-8 at 8).

[57] JA 404 (PX-47 at 16:2-6).

[58] JA 410 (PX-47 at 23:15-18).

not necessary . . . to afford minorities the opportunity to choose a candidate of their choice."[59]

The Senate adopted the Janis plan on a vote of 20-19, and Governor McDonnell signed it into law on January 25, 2012.[60] DOJ precleared the plan in March 2012.[61]

3. On June 25, 2013, this Court, in *Shelby County v. Holder*, invalidated the coverage formula in § 4 of the VRA,[62] under which Virginia had been a covered jurisdiction that was required to seek preclearance under § 5.[63]

In October 2013, three voters in CD3 filed this action, seeking to invalidate that district as a racial gerrymander.[64] A three-judge court was convened consisting of Judge Duncan, Judge Payne, and Judge O'Grady.[65] The parties consented to intervention by Virginia's eight Republican congressmen: Robert J. Wittman (CD1), Scott Rigell (CD2), J. Randy Forbes (CD4), Robert Hurt (CD5), Bob Goodlatte (CD6), Eric Cantor (CD7), Morgan Griffith (CD9), and Frank Wolf

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[59] JA 409 (PX-47 at 22:13-16).

[60] JA 109 (PX-8 at 9), 412 (PX-47 at 25:16).

[61] Jurisdictional Statement (JS) 10a.

[62] 52 U.S.C. § 10303.

[63] 133 S. Ct. 2612, 2631 (2013).

[64] JS 3a-4a.

[65] Order (Oct. 21, 2013), ECF No. 10.

(CD10).[66] Virginia's three Democratic congressmen did not intervene.

The district court denied motions for summary judgment, finding "genuine disputes of material fact,"[67] and conducted a two-day trial in May 2014.

The trial record consisted of the parties' documentary exhibits and the live testimony of two experts. Michael McDonald was qualified as an expert for Plaintiffs in the field of political science.[68] His expert reports were received into evidence[69] and he testified at length about his finding that race predominated in drawing CD3.[70] McDonald also testified about a hypothetical "Alternative Plan"[71] that the legislature could have adopted. The Alternative Plan had a BVAP in CD3 of 50.2%[72] and would have improved performance with regard to traditional redistricting principles, including compactness, contiguity, and reducing splits in localities and precincts.[73]

On cross-examination, McDonald acknowledged that the Alternative Plan would have changed CD2

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[66] Order (Dec. 3, 2013), ECF No. 26.

[67] Order (Jan. 27, 2014), ECF No. 50.

[68] JA 562 (Tr. 27:3-6).

[69] JA 175-296 (PX-26 to PX-30).

[70] JA 560-745 (Tr. 25-239).

[71] JA 631-39 (Tr. 107-17); *see* JA 257-73 (PX-29) (analysis); JA 424-26 (PX-49) (maps).

[72] JA 673 (Tr. 157:13-18); JA 257, 268 (PX-29 at 1, 8).

[73] JA 632-39 (Tr. 109-17).

from a "50 percent toss-up district" to a 55% Democratic district, which might reduce Republican dominance in Virginia's congressional delegation from 8-3 to 7-4.[74] The defense also sought to show that the Alternative Plan did not maintain the core of the district as well as Enacted CD3.[75]

The defense also attacked McDonald's credibility by showing that he had written a law review article, before his engagement, opining that the purpose of the 2012 plan was "to create an 8-3 Republican majority."[76] McDonald explained at trial, however, that he had not analyzed the use of race in redrawing CD3 when he had written that article.[77]

The defense offered John Morgan as their only witness. He was qualified as an expert in demography and redistricting.[78] Morgan testified that the creation of CD3 was explainable by politics and incumbency protection.[79] Morgan admitted on cross-examination, however, that he had made mistakes in his quantitative analysis.[80] Although he corrected some of those errors before trial, more were brought

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[74] JA 697 (Tr. 184:15-19).

[75] JA 515-16 (IX-27); JA 889 (Tr. 422:18-21).

[76] JA 649-50 (Tr. 129:3-25).

[77] JA 566-67, 733 (Tr. 32:7-11, 226:4-21).

[78] JA 746 (Tr. 241:18-23).

[79] JA 751 (Tr. 247:2-11).

[80] JA 836-43 (Tr. 359-66).

out during cross-examination.[81] Morgan insisted that those mistakes did not affect his opinion.[82]

There was conflicting evidence about whether the General Assembly applied a 55%-BVAP floor in drawing CD3. Morgan, who helped the Republican members redraw the House of Delegates districts in the same special session,[83] opined in his expert report that the General Assembly could reasonably believe that a 55%-BVAP floor was needed to obtain preclearance from DOJ.[84] He said that the black-majority House districts all exceeded 55% BVAP and that several alternatives under 55% were not adopted.[85] At trial, however, Morgan denied having personal knowledge that legislators had applied a 55%-BVAP floor.[86]

As further proof that a racial floor was used, Plaintiffs pointed to various statements by legislators about the need for a 55%-BVAP floor.[87] In addition, Virginia's § 5 submission touted the 56% BVAP of Enacted CD3 as being "over 55 percent,"[88] comparing it

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[81] JA 841 (Tr. 365:3-10).

[82] JA 864-65 (Tr. 392:3-24).

[83] JA 747 (Tr. 242:17-25).

[84] JA 829-31 (Tr. 351:20-353:8); JA 517-18 (IX-13 at 26-27).

[85] JA 808-09 (Tr. 327:14-328:23); JA 517-18 (IX-13 at 26-27).

[86] JA 809-10 (Tr. 328:24-330:1).

[87] JA 397-98 (PX-45 at 7-8); JA 527 (IX-30 at 13-14); JA 533, 534, 536 (IX-32 at 18, 20, 22).

[88] JA 77 (PX-1 at 41).

to other proposed plans that would have resulted in a BVAP "below 55 percent."[89]

4. By a 2-1 vote, the district court found that CD3 was an unconstitutional racial gerrymander and enjoined Virginia from conducting any further congressional elections under the 2012 plan.[90] Intervenors alone appealed. After this Court decided *Alabama*, the Court vacated the judgment in this case and remanded for further consideration in light of that decision.[91]

On remand, the district court again found 2-1 that CD3 was unconstitutional. Writing for the majority, Judge Duncan explained that the "legislative record here is replete with statements indicating that race was the legislature's paramount concern in enacting the 2012 Plan."[92] The court also concluded that the legislature had used "a 55% BVAP floor" in redrawing CD3.[93]

The majority found McDonald's testimony credible. It rejected the defense claim that McDonald's analysis was discredited by his earlier law review article, written before he had analyzed the use of

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[89] JA 78, 79 (PX-1 at 42, 43).

[90] *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 554-55 (E.D. Va. 2014), *vacated and remanded sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015).

[91] *Cantor*, 135 S. Ct. at 1699.

[92] JS 18a.

[93] JS 20a-21a.

race.[94] The majority also discounted Morgan's testimony, pointing out his weak credentials, his failure to perform a racial bloc voting analysis, and his mistakes in analyzing population swaps.[95]

Finding that racial considerations predominated, the court applied strict scrutiny, concluding that, while complying with § 5 was a compelling state interest, the use of race was not narrowly tailored to avoid retrogression in CD3.[96] "[T]he 2012 Plan was not informed by a racial bloc voting or other, similar type of analysis."[97] The General Assembly also increased the BVAP in CD3 from 53.1% to 56.3%, despite that Congressman Bobby Scott, "a Democrat supported by the majority of African-American voters," had been repeatedly reelected by large margins.[98] Indeed, under Enacted CD3, Scott won reelection in 2012 "by an even larger margin, receiving 81.3% of the vote."[99]

The court enjoined any further elections under the 2012 plan and gave the legislature until September 1, 2015 to revise it.[100] The court said that Virginians in the "Third Congressional District whose

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[94] JS 21a-22a n.16.

[95] *Id.*

[96] JS 36a-38a.

[97] JS 9a; *see also* JS 21a.

[98] JS 40a.

[99] JS 40a; *see* JA 205 (PX-27 at 11).

[100] JS 94a.

constitutional rights have been injured by improper racial gerrymandering have suffered significant harm" and "'are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan.'"[101]

Judge Payne dissented. He rejected McDonald's testimony,[102] concluding that "McDonald's views, in whole and in its constituent parts, are not entitled to any credibility."[103] Judge Payne believed Morgan's testimony instead.[104] Judge Payne also concluded that statements by Delegate Janis about the importance of nonretrogression in CD3 failed to prove that race was the predominant factor in the redistricting.[105]

Judge Payne also was not persuaded that the legislature had imposed a 55%-BVAP floor in redrawing CD3, calling Plaintiffs' evidence "a patchwork quilt."[106] (In a later-tried case, however, involving a challenge to the House districts, Judge Payne concluded "that the 55% BVAP figure *was used* in structuring the districts and in assessing whether the

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[101] JS 43a (quoting *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981)).

[102] JS 48a-53a.

[103] JS 53a.

[104] JS 83a-85a.

[105] JS 62a.

[106] JS 66a-67a.

redistricting plan satisfied constitutional standards and the VRA . . . ."[107]).

Intervenors noted a timely appeal to this Court.

5. While the appeal was pending here, the remedial phase proceeded in the district court. The General Assembly convened in special session on August 17, 2015, but the Senate adjourned without agreement on a plan. After the September 1 deadline passed, the district court invited the parties and any interested non-parties to propose plans. Remedial plans were submitted by, among others, Plaintiffs, Intervenors, the NAACP, and the Governor of Virginia. The court appointed Dr. Bernard Grofman as special master.[108]

On November 16, 2015, the Special Master filed his report, rejecting all of the proposed submissions and recommending two remedial plans of his own. He found "the obvious way to remedy the constitutional violation in CD3 is to redraw CD3 as a Newport

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[107] *Bethune-Hill v. Va. State Bd. of Elections*, 2015 WL 6440332, at *9, 2015 U.S. Dist. LEXIS 144511, at *27 (E.D. Va. Oct. 22, 2015) (emphasis added), *jurisdictional statement docketed*, No. 15-680. *See also id.* at *41, 2015 U.S. Dist. LEXIS 144511, at *120 ("[T]he Court finds that a 55% BVAP floor was employed by Delegate Jones and the other legislators who had a hand in crafting the Challenged Districts. Those delegates believed this necessary to avoid retrogression under federal law, and we do not doubt the sincerity of their belief."). The court was unanimous on that point. *See id.* at *63, 2015 U.S. Dist. LEXIS 144511, at *186 (Keenan, J., dissenting).

[108] Mem. Op. at 1-3, ECF No. 299.

News-Hampton-Portsmouth-Norfolk based district that is contiguous, highly compact, and has few city splits."[109] His revisions were based on traditional redistricting considerations, not race.[110] The Special Master explained that his was a "least change" approach, making the minimal changes necessary to CD3 to correct the constitutional violation and limiting the effect of those changes to the immediately adjoining districts, CDs 1, 2, 4, and 7.[111]

The Special Master concluded that neither of his plans would impair the ability of African American voters in CD3 to elect a candidate of choice.[112] The BVAP scores in CD3 under his two proposals exceeded 42%.[113] He credited an expert report from Dr. Lisa Handley,[114] which concluded that, because of significant white-crossover voting, a BVAP in CD3 of 30-34% was sufficient to enable black voters to elect a candidate of choice.[115] Accordingly, the Special Master

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[109] Report of the Special Master at 21, ECF No. 272 (SM Report).

[110] *Id.* at 3, 4, 9, 11, 15, 16.

[111] *Id.* at 19-25.

[112] *Id.* at 37.

[113] *Id.* at 45.

[114] *Id.* at 38-41, 63.

[115] *See* Dr. Lisa Handley, *Providing Black Voters with an Opportunity to Elect Candidates of Choice: A District-Specific Functional Analysis of the Third Congressional District in Virginia* at 16 (Sept. 17, 2015), ECF No. 231-3, *available at* http://redistricting.dls.virginia.gov/2010/Data/Court%20Ordered%20Redistricting/Governor.zip ("[E]ven a district that is as low as 30 to 34% black

(Continued on following page)

concluded that a district "somewhat above a 40%" BVAP would not retrogress.[116]

After conducting a hearing on December 14, 2015, the district court, on January 7, 2016, denied Intervenors' motion for a stay pending appeal and ordered Virginia election officials (as they had requested) to implement the Special Master's proposed remedial plan (Plan 16) for the 2016 election cycle.[117] The district court found that the remedial plan cured the racial gerrymander by redrawing CD3 according to "neutral goals of compactness, contiguity, and avoiding unnecessary city or county splits, rather than any racial considerations."[118] The court also found that the plan complied with the VRA. Because of significant white-crossover voting, the 45.3% BVAP of the remedial plan preserved "African-American voters' ability to elect the representative of their choice."[119]

After CD3, CD4 is the district next most affected by the remedial plan. The BVAP in CD4 increases from 31.3% to 40.9%.[120] The Special Master observed that the higher BVAP creates a "realistic opportunity"

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in voting age population can provide black voters with an opportunity to elect their preferred candidates to represent the Third Congressional District.").

[116] SM Report at 37.

[117] Mem. Op., ECF No. 299; Order, ECF No. 300.

[118] Mem. Op. at 17, ECF No. 299.

[119] *Id.*

[120] *Id.* at 25; Supplemental Comments to the Report by the Special Master at 52, ECF No. 294 (SM Supp.).

for a candidate of choice of African-American voters to win election there.[121] Democratic performance (measured by the election results for the 2012 Presidential election) would also increase from 48.8% to 60.9%.[122] The Special Master made clear that he did not set out to increase the BVAP in CD4 or to make it more Democratic; that was simply the byproduct of revising CD3 using traditional redistricting principles.[123]

It is not clear if the increase in Democratic performance in CD4 will cause Representative Forbes to lose reelection in 2016. Forbes defeated his Democratic challenger in 2014 by a vote of 60.1% to 37.5%.[124] The Special Master noted, however, that revised CD4 will be a "competitive" district where it is now "a safe seat for the Republican incumbent."[125]

SUMMARY OF ARGUMENT

1. Representative Forbes has standing to appeal. The court-ordered remedy transforms CD4 into a majority-Democratic district, where before it was

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[121] SM Report at 55-56.

[122] *Id.*

[123] *Id.* at 4, 15-16, 42. *See also* SM Supp. at 8.

[124] *See* Va. Dep't of Elections, Election Results for Nov. 2014, U.S. House Dist. 4, *available at* http://historical.elections.virginia.gov/elections/search/year_from:2014/year_to:2014/stage:General.

[125] SM Supp. at 11.

a "safe" seat for Forbes. Although that change does not guarantee that Forbes will lose his reelection bid, it impairs his reelection opportunity sufficiently to satisfy the injury-in-fact requirement that this Court has applied in previous cases.

Plaintiffs conflate the standing of a voter to bring a racial gerrymandering claim with the standing of an intervenor-defendant who claims direct and unique injury as the result of the required remedy. The injury imposed by the remedy does not go away simply because the intervenor himself could not have brought the same gerrymandering claim as Plaintiffs. When, as here, the required remedy imposes direct injury on the intervenor in a manner that satisfies Article III, the intervenor has standing to appeal the judgment.

2. Although the appeal is justiciable, the Court should affirm. Intervenors offer the same view of the evidence that they (and we) argued at trial. But the facts must now be taken in the light most favorable to Plaintiffs, and the district court's findings cannot be set aside unless clearly erroneous. Under that standard, Intervenors cannot prevail.

Substantial evidence supports the district court's finding on a crucial fact: the legislature applied a 55%-BVAP floor to increase the percentage of black voters in CD3. Indeed, Intervenors' own expert opined that the legislature employed that racial target. The 55%-BVAP floor was also corroborated by Janis's floor statements, by Virginia's § 5 submission, and by the

floor statements of other legislators in contemporaneous debates involving the House districts. Janis also insisted that the higher BVAP percentage was needed to obtain DOJ preclearance under § 5, and that avoiding retrogression was the "primary," "paramount," and "nonnegotiable" concern in drawing CD3.

The 55%-BVAP floor caused the legislature to move thousands of black voters into CD3. Race thus determined *which* voters were moved. And contrary to Judge Payne's understanding that no legislator had complained about race-based redistricting, two Senators explicitly called out what was happening at the time as racial "packing" that would dilute the vote of African Americans.

Because direct evidence supported the finding of racial predominance, circumstantial evidence was unnecessary. But there was that too. CD3 is bizarrely shaped, the least compact of all eleven districts, and the district with the most locality and VTD splits. And the population swaps needed to increase the BVAP in CD3 disproportionately affected black voters.

Intervenors (and their amici, Alabama and Texas) are wrong that strict scrutiny does not apply unless race "actually conflicts" with traditional redistricting considerations. The Court rejected any such requirement in *Miller*, *Bush v. Vera*,[126] and *Shaw v. Hunt* (*Shaw II*).[127] The Court instead looks at whether

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[126] 517 U.S. 952 (1996).

[127] 517 U.S. 899 (1996).

racial considerations predominated in the hierarchy of factors by having a qualitatively greater influence, thereby subordinating other considerations.

Intervenors are likewise wrong that a fixed racial quota should not trigger strict scrutiny as long as politics could have led to the same outcome. Strict scrutiny applies if a State uses race as a "proxy" to pack black voters into a district for political reasons. It likewise applies if the State uses race as the excuse to do the same thing.

In any case, Intervenors' political explanation for CD3—that the legislature simply was trying to entrench an 8-3 partisan split favoring Republicans—was rejected by the majority of the district court. That finding was not clearly erroneous because Janis expressly disclaimed any such partisan intent.

The extensive direct evidence that race predominated distinguishes this case from *Easley v. Cromartie*, where the strongest evidence of racial predominance was a single legislator's comment that the plan represented "a fair, geographic, racial and partisan balance throughout the State of North Carolina."[128] The evidence of racial predominance here—intentionally maintaining a black-majority district by increasing its BVAP above a 55% floor—is even stronger than the direct evidence found sufficient in *Miller*, *Bush*, and *Shaw II*, cases that *Easley* cited as models.

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[128] 532 U.S. 234, 253 (2001).

Given the direct evidence that race predominated, Intervenors are wrong that Plaintiffs also had to introduce an alternative plan to show how the districts could have been drawn with greater racial balance while respecting the legislature's policy choices. Plaintiffs *did* introduce an alternative plan to prove just that. But they did not need to. An alternative plan can be useful in the absence of direct evidence to show, circumstantially, that race predominated. That the legislature *could* have accomplished its objectives without relying so much on race helps prove that it *did* rely too much on race. But circumstantial evidence is unnecessary when, as here, direct evidence proves the point better than anything else.

3. In light of its factual findings, which are supported by substantial evidence, the district court did not err in holding that the legislature's use of a racial floor was not narrowly tailored to serve a compelling governmental interest. As a matter of law, the requirement under § 5 to avoid retrogression did not compel Virginia to freeze the percentage of black voters in CD3, let alone to raise it above 55%. This Court's precedents had made that point clear years before.

There was also no evidence to support a reasonable belief that DOJ required a 55%-BVAP floor as a condition of preclearance. DOJ disclaimed any such requirement in its Guidance in February 2011, weeks before Janis even introduced his plan. In addition, CD3 had been precleared in the past with lower BVAP scores. DOJ also precleared a number of Virginia

Senate districts in 2011, the year before the congressional plan was finally adopted, with BVAP scores under 55%.

The defense also offered no evidence to carry its burden of proving that a 55%-BVAP floor was needed to obtain preclearance under § 5. Morgan, the only defense witness, disclaimed any opinion on the narrow-tailoring question. That admission was fatal. And the gap in the defense case could not be filled by attacking Plaintiffs' Alternative Plan. The Alternative Plan showed how the districts could have been revised to meet the legislature's stated redistricting goals without relying on race to the same extent as the Enacted Plan. So it showed the absence of narrow tailoring. More importantly, since the defense bore the burden to prove narrow tailoring, attacking someone else's plan was not enough. Intervenors failed to show that the government needed to use a mechanical racial floor to protect minority voting rights.

ARGUMENT

As the district court recognized in denying summary judgment,[129] the parties disputed whether race predominated when the General Assembly redrew CD3. We joined with Intervenors at trial to defend the Enacted Plan. Had the majority viewed the

[129] Order (Jan. 27, 2014), ECF No. 50.

evidence as we argued, CD3 was not unconstitutional. But the majority did not see it that way.

This Court may not reverse simply because it "would have decided the case differently."[130] The district court's findings are reviewed "only for 'clear error.'"[131] Under the "clearly erroneous" standard, the question is "whether 'on the entire evidence,' [the Court] is 'left with the definite and firm conviction that a mistake has been committed.'"[132] Because that demanding standard cannot be satisfied, the State defendants did not appeal.[133]

Although Representative Forbes has standing to appeal, the Court should affirm. The evidence, taken in the "light most favorable" to Plaintiffs,[134] supports the majority's finding that race predominated, thereby triggering strict scrutiny. And because the 55%-BVAP floor was not needed to protect minority voting

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[130] *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

[131] *Id.* (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

[132] *Id.* (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[133] In noting that the current Attorney General of Virginia, Mark R. Herring, did not appeal, Judge Payne mistakenly thought that the previous Attorney General, a Republican, was the one whose office defended the plan at trial. *See* Mem. Op. at 37 n.17, ECF No. 299; JS 45a n.30. General Herring was inaugurated in January 2014, and his office defended the plan alongside Intervenors at the May 2014 trial.

[134] *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 213 (1993).

rights, the district court properly invalidated CD3 as racially gerrymandered.

I. Representative Forbes has standing to appeal.

Article III's standing requirement must be met "'by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'"[135] The appeal is justiciable as long as one of the appellants has standing.[136] To have standing, an appellant "must seek relief for an injury that affects him in a 'personal and individual way.'"[137] The injury-in-fact requirement "distinguishes 'a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem.'"[138]

When Intervenors filed their opening brief, the district court had not yet selected a remedial plan for CD3, although all of the proposed plans then pending

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[135] *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

[136] *E.g.*, *Horne v. Flores*, 557 U.S. 433, 446 (2009); *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

[137] *Hollingsworth*, 133 S. Ct. at 2662 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992)).

[138] *Diamond v. Charles*, 476 U.S. 54, 66-67 (1986) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)).

would have made "at least one Republican district majority-Democratic."[139] On January 7, 2016, however, the district court implemented the Special Master's Plan 16. That plan has the effect of increasing the Democratic vote share in Forbes's CD4 from 48.8% to 60.9%.[140]

The Special Master acknowledged that the remedial plan will make Forbes's 2016 election in CD4 "closely contested"[141] where it is now a "safe seat."[142] That constitutes a direct, personal injury to Forbes that is "fairly traceable" to the judgment from which he has appealed and that would be "redressable by a favorable ruling" should Forbes prevail.[143]

This Court has repeatedly held that candidates have standing to challenge governmental actions that impair their election opportunity. *Davis v. FEC* held that a congressional candidate had standing to challenge asymmetrical campaign-finance restrictions that burdened his candidacy.[144] *Storer v. Brown* held that candidates had "ample standing" to challenge restrictive ballot-access requirements.[145] And the standing

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[139] Appellants' Br. at 58.

[140] SM Report at 55-56.

[141] *Id.* at 55.

[142] SM Supp. at 11.

[143] *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)).

[144] 554 U.S. 724, 731-73 (2008).

[145] 415 U.S. 724, 738 n.9 (1974).

of the presidential contenders in *Bush v. Gore* was so obvious that it went unmentioned.[146]

Even in a case not involving election-law issues, the Court in *Meese v. Keene*[147] recognized impaired reelection chances as the basis for standing. Keene, a film exhibitor and a member of the California Senate, had standing to challenge the constitutionality of a federal statute that branded the films he wanted to show as "political propaganda." The pejorative label "would *substantially harm his chances for reelection* and would adversely affect his reputation in the community."[148] Keene could not show the films without risking "an impairment of his *political career*"[149] and substantial detriment to his "reputation and *candidacy*."[150]

Just as in those cases, the injury-in-fact requirement is satisfied here because remedying CD3 will necessarily make Forbes's CD4 a majority-Democratic district, posing a material "'obstacle to [Forbes's] candidacy.'"[151] That obstacle is a direct, concrete injury to Forbes, not some "undifferentiated, generalized

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[146] 531 U.S. 98 (2000).

[147] 481 U.S. 465 (1987).

[148] *Id.* at 474 (emphasis added).

[149] *Id.* at 475 (emphasis added).

[150] *Id.* (emphasis added).

[151] *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 665 (1993) (quoting *Clements v. Fashing*, 457 U.S. 957, 962 (1982)) (emphasis altered).

grievance about the conduct of government" shared by the public at large.[152]

To be sure, Forbes may still be reelected, and he has failed to show the likelihood of irreparable harm.[153] But that is not the measure of justiciable injury. A non-incumbent who challenges an election restriction does not have to prove that he "would actually have been elected" but for the restriction.[154] An incumbent likewise need not prove his certain defeat as a condition of challenging a substantial obstacle to reelection.

Plaintiffs confuse the standing of a voter to challenge a racially gerrymandered district in the first instance with the standing of an intervenor-defendant to appeal an adverse judgment that directly and adversely affects his interests.[155] It is true that, under *United States v. Hays*[156] and *Sinkfield v. Kelley*,[157] Intervenors would not have had standing in their capacity as *voters* in adjoining districts to challenge CD3, or to complain about the impact on their own districts were CD3 redrawn. When a voter does

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[152] *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam).

[153] *See* VSBE Opp. to Intervenor-Defs.' Stay Appl. at 29-30.

[154] *Ne. Fla. Chapter of Associated Gen. Contractors*, 508 U.S. at 665.

[155] Supp. Br. for Appellees Gloria Personhuballah and James Farkas on Standing at 8-10.

[156] 515 U.S. 737 (1995).

[157] 531 U.S. 28 (2000) (per curiam).

not live in the gerrymandered district, "any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference."[158] The rule is the same when the voter lives in an adjacent district that was "necessarily influenced by the shapes of the majority-minority districts upon which they border."[159]

But a plaintiff's standing to sue is different from that of a defendant or intervenor to appeal an adverse judgment. Thus, in *ASARCO Inc. v. Kadish*,[160] the Court held that the intervenor-defendants had standing to seek review of the judgment of the Arizona Supreme Court that invalidated, as preempted by federal law, an Arizona statute under which they held State-mineral leases. "[A]s a result of the state-court judgment, the case ha[d] taken on such definite shape that they [were] under a defined and specific legal obligation, one which causes them direct injury."[161]

Representative Forbes is in the same position here. Because the remedy required by the judgment jeopardizes his reelection opportunity, Forbes "is not merely an undifferentiated bystander with claims

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[158] *Hays*, 515 U.S. at 745.

[159] *Sinkfield*, 531 U.S. at 30.

[160] 490 U.S. 605 (1989).

[161] *Id.* at 618.

indistinguishable from those of the general public."[162] So his appeal is justiciable.

II. The district court did not commit clear error in finding that race was the predominant factor in drawing CD3.

A. Substantial evidence supported the majority's finding that race predominated.

1. There was sufficient direct evidence of a 55%-BVAP floor.

Substantial evidence supported the district court's conclusion that the General Assembly applied a 55%-BVAP floor when it concentrated black voters in CD3, evidence that Intervenors do not even mention in their statement of facts. Morgan was the Republican consultant for the House of Delegates redistricting plan during the 2011 special session. In a sworn[163] expert report, Morgan explained why he concluded that a 55%-BVAP floor was used for the congressional plan:

> [T]he General Assembly enacted, with strong support of bipartisan and black legislators, a House of Delegates redistricting plan with a 55% [BVAP] *as the floor for black-majority*

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[162] *Meese*, 481 U.S. at 476. Once a litigant has standing, Article III does not restrict the legal arguments that may be asserted to win relief. *Bond v. United States*, 131 S. Ct. 2355, 2361-62 (2011).

[163] JA 520 (IX-13 at 28).

> *districts* . . . including districts within the geography covered by Congressional District 3. The General Assembly . . . had ample reason to believe that legislators of both parties, including black legislators, viewed the 55% [BVAP] for the House of Delegates districts as appropriate to obtain Section 5 preclearance, even if it meant raising the [BVAP] above the levels in the benchmark plan. *The General Assembly acted in accordance with that view for the congressional districts and adopted the Enacted Plan with the District 3 [BVAP] at 56.3%.*[164]

Although Morgan tried to walk back his admission at trial, saying that he lacked *personal* knowledge of any 55%-BVAP floor,[165] the majority did not commit clear error in relying on the prior admission in the expert report that Intervenors themselves offered into evidence.[166]

Morgan's conclusion that the General Assembly acted in accordance with a 55%-BVAP floor was supported by other evidence. Statements in a § 5 submission may constitute "direct evidence of the legislature's objective."[167] In this case, Virginia's § 5 submission advocated the 56.3% BVAP of Enacted

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[164] JA 518 (IX-13 at 26-27) (emphasis added); JA 829-30 (Tr. 351:20-352:25).

[165] JA 809-11 (Tr. 328:24-330:25).

[166] JS 20a-21a; JA 518 (IX-13 at 26-27).

[167] *E.g.*, *Bush v. Vera*, 517 U.S. 952, 960 (1996) (plurality); *Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (*Shaw II*).

CD3 as being "over 55 percent,"[168] comparing it to other alternative plans that would have resulted in a BVAP "below 55 percent."[169]

Admissions by the plan's draftsman may also constitute "direct evidence" of racial motivation.[170] In this case, Delegate Janis indicated that his principal objective in drawing the lines was not only to preserve the same BVAP in CD3 but to increase it above a 55% threshold. Janis said he was "mindful that the [V]oting [R]ights [A]ct requires us not to retrogress that district," so "under the new proposed lines, *we can have no less than percentages that we have under the existing lines* . . . ."[171] Insisting that § 5 prevents any reduction in the existing BVAP is the same legal mistake called out in *Alabama* as "strong, perhaps overwhelming evidence" that race predominated there: "that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible."[172]

Yet Janis sought not only to maintain the BVAP in CD3 but to materially augment it. One delegate questioned Janis about the 55% target: "[I]s there any empirical evidence whatsoever that 55 percent

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[168] JA 77 (PX-1 at 41).

[169] JA 78-79 (PX-1 at 42-43).

[170] *E.g.*, *Shaw II*, 517 U.S. at 906.

[171] JA 119-20 (PX-13 at 8:17-21) (emphasis added).

[172] *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1271 (2015).

African-American voting population is different than 51 percent or 50? Or is it just a number that has been pulled out of the air?"[173] Janis responded that it made getting § 5 preclearance a "certainty," whereas the 40% BVAP in Senator Locke's competing plan jeopardized preclearance.[174]

Plaintiffs also introduced the floor debates addressing the redistricting plan for the House districts—occurring in the same special session—that reflected the same mistaken belief that a 55%-BVAP floor was needed for DOJ preclearance. Delegate Dance explained that populations were shifted among three black-majority districts to get "at least 55 percent performing."[175] And Senator Vogel (who later sponsored Janis's plan in the Senate[176]) left no doubt about the need for a 55% floor:

> [W]hen it came to Section 5—I just want to be very clear about this—that we believed that that was not really a question that was subject to any debate. The lowest amount of African Americans in any district that has ever been precleared by the Department of Justice is 55.0.[177]

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[173] JA 397 (PX-45 at 7:9-12).

[174] JA 398-99 (PX-45 at 7:13-8:20).

[175] JA 527 (IX-30 at 13:23-25).

[176] JA 108 (PX-8 at 8).

[177] JA 533 (IX-32 at 18:11-16).

> We were just simply following what, I believe, is not subject to any question; that is, as of today, the lowest percentage that the Department of Justice has ever approved is 55.0.[178]
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> * * *
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> [I]t has been the position of the Department of Justice, and I will speak to this very confidently, that 55.0 is the percentage that they believe is what is qualified, and that has been, at least in the past to date, their position regarding what it would take to be able to elect a candidate of your choice, whomever that might be.[179]

Objecting to the use of a mechanical racial target in the congressional redistricting plan, Delegate Armstrong found it "clear" that there was a "pattern" in light of how the majority-minority House districts had been structured.[180]

That the 55%-BVAP floor predominated in revising CD3 was further supported by Janis's insistence that nonretrogression was his "primary focus"[181] and the "paramount,"[182] "nonnegotiable"[183] concern. We

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[178] JA 534 (IX-32 at 20:8-11).

[179] JA 536 (IX-32 at 22:6-12).

[180] JA 389, 390 (PX-43 at 47:1-8, 48:7-9).

[181] JA 370 (PX-43 at 25:14).

[182] JA 370 (PX-43 at 25:8).

[183] JA 370 (PX-43 at 25:10).

agree with Intervenors that general statements about the need to comply with federal law, including the Voting Rights Act, should not suffice, standing alone, to prove that racial considerations predominated.[184] But in this case, the insistence that nonretrogression was paramount was joined with the claim that a 55%-BVAP floor was the means for avoiding retrogression. That made race the predominant factor.

2. The 55%-BVAP floor led the legislature to move a significant number of African Americans into CD3.

Alabama explained that race predominates when the legislature "'place[s]' race 'above traditional districting considerations in determining *which* persons were placed in appropriately apportioned districts.'"[185]

> In other words, if the legislature must place 1,000 or so additional voters in a particular district in order to achieve an equal population goal, the 'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominately uses race as

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[184] *See Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) ("preference for federal over state law when . . . the two in conflict does not raise an inference of intentional discrimination; it demonstrates obedience to the Supremacy Clause of the United States Constitution").

[185] 135 S. Ct. at 1271 (quoting United States Amicus Br. at 19) (emphasis altered).

> opposed to other, 'traditional' factors when doing so.[186]

The evidence found by the district court met that test. The black population of CD3 was intentionally increased to raise the BVAP score from 53.1% to 56.3%, to ensure compliance with the 55%-BVAP floor supposedly needed for preclearance.[187] The actual population swaps confirmed that a racial floor had been applied; three times the number of people were moved in and out of CD3 than needed to equalize the population, and the moves were overwhelmingly race-based.[188] Thus, contrary to Intervenors' claim, core-preservation concerns did not predominate over race in determining "which" people to move into CD3; the 55%-BVAP floor demanded black voters. And as *Alabama* shows, core preservation does not predominate when, as here, it "is not directly relevant to the origin of the *new* district inhabitants."[189]

3. Intervenors wrongly claim that there was no evidence of "packing."

In his dissent, Judge Payne mistakenly discounted Plaintiffs' evidence of racial packing because he incorrectly believed that no legislator had actually

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[186] *Id.*

[187] JA 395-96, 397-99 (PX-45 at 4:15-5:15, 7:6-8:20); JA 427 (PX-50).

[188] JS 30a (citations omitted).

[189] 135 S. Ct. at 1271.

complained about it: "[n]otwithstanding the fact that these opponents of the Enacted Plan had every reason to characterize the Enacted Plan in the harshest terms possible (i.e., as race driven or as the product of a racial quota), they did not do so."[190] Intervenors repeat that mistake in their opening brief.[191]

In fact, Senator Locke rose to condemn the Enacted Plan on the ground that CD3 "has been packed" with black voters, warning that "those African-Americans living in the 1st, 2nd, and 4th congressional districts that abut the 3rd are essentially disenfranchised."[192] And Senator McEachin likewise characterized the plan as "packing" black people into "a single congressional district, more than what is necessary to elect a candidate of choice," thereby "depriving minorities of their ability to influence elections elsewhere."[193]

Intervenors similarly misstate the record when they claim that Plaintiffs' expert supposedly "conceded at trial" that "packing does not exist" in CD3.[194] Intervenors quote McDonald out of context. In fact, McDonald testified unequivocally that more black voters were moved into CD3 than needed to protect

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[190] JS 69a (Payne, J., dissenting).

[191] Appellants' Br. at 6.

[192] JA 404 (PX-47 at 16:2-6).

[193] JA 409 (PX-47 at 22:3-10).

[194] Appellants' Br. at 13.

their ability to elect a candidate of choice.[195] To McDonald, however, "packing" meant placing *so* many black voters in one district as to deny other black voters the ability to have a *second* black-majority district; in *that* sense, he said, CD3 was not "packed."[196] But that atypical notion of packing is different from common usage. As Justice White said in *Shaw v. Reno* (*Shaw I*), "the purposeful creation of a majority-minority district could have discriminatory effect if it is achieved by means of '*packing*'—i.e., *overconcentration* of minority voters."[197] *Alabama* used the same formulation in saying that a "racial gerrymander" occurs "when the State adds more minority voters than needed for a minority group to elect a candidate of its choice."[198]

The district court had ample evidence to find that "packing" created precisely that type of "racial gerrymander" here.

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[195] JA 715 (Tr. 204:23-24).

[196] JA 716 (Tr. 205:9-22).

[197] 509 U.S. at 670 (White, J., dissenting) (emphasis added). *See also Voinovich*, 507 U.S. at 154 ("'[Dilution of racial minority group voting strength may be caused' either 'by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority.'") (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)).

[198] 135 S. Ct. at 1263.

4. Plaintiffs' circumstantial evidence corroborated their direct evidence.

Although the direct evidence sufficed, Plaintiffs also adduced significant circumstantial evidence to corroborate that race predominated in drawing CD3. McDonald testified:

- "The district is bizarrely shaped. It stretches from Richmond to Norfolk skipping back and forth across the James River mostly to capture predominantly African-American communities."[199] In Norfolk, for example, "it wraps around a small—three predominantly white precincts that are not connected to the Second District via bridge or anything else. They are only connected by water."[200]
- Enacted CD3 is the least compact of Virginia's 11 congressional districts.[201]
- It relies on contiguity by water, not land, in an apparent effort to connect pockets of black voters and to "bypass" white voters.[202]
- It splits more localities and VTDs than any other district.[203]

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[199] JA 575 (Tr. 42:13-16).

[200] JA 576 (Tr. 43:8-11); *see also* JA 191-92 (PX-27 at 3-5) (maps).

[201] JA 603 (Tr. 74:5-13).

[202] JA 603-04 (Tr. 74:18-76:9).

[203] JA 605-07 (Tr. 76:10-79:3); JA 201 (PX-27 at 10).

- And although Benchmark CD3 was underpopulated by 63,976, 180,000 people were moved between districts to net the number required,[204] and the percentage of black voters moved into CD3 was disproportionately high compared to voters moved out of CD3.[205] Indeed, several highly Democratic-performing but largely white VTDs that could have been included in CD3 were left out in favor of denser black VTDs.[206]

B. Racial floors trigger strict scrutiny even if used for political gerrymandering.

Intervenors are mistaken when they say that race not only must predominate over traditional redistricting considerations before strict scrutiny applies, but that race must *actually conflict* with traditional factors.[207] They cite Judge Payne as the only legal authority for that argument.[208]

But this Court has never imposed an actual-conflict requirement. *Alabama* did not require a

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[204] JA 614 (Tr. 87:3-16).

[205] JA 611-14 (Tr. 83:25-87:6).

[206] JA 616 (Tr. 89:6-23).

[207] Appellants' Br. at 25.

[208] JS 64a (Payne, J., dissenting) ("But I read the Supreme Court's precedent as demanding *actual* conflict between traditional redistricting criteria and race . . . ."); *see also Bethune-Hill*, 2015 WL 6440332, at *15, 2015 U.S. Dist. LEXIS 144511, at *43-44 (Payne, J.) (same, citing his dissenting opinion in *Page*).

finding that race *conflicted* with traditional factors, only that "the legislature 'placed' race '*above* traditional districting considerations in determining *which* persons'" to move.[209] *Miller v. Johnson* effectively rejected an actual-conflict requirement when the Court said that a plaintiff does not have to prove that the "district's shape is so bizarre that it is unexplainable other than on the basis of race."[210] The essence of the constitutional violation is when the "State has used race as a basis for separating voters into districts."[211] Bizarreness of shape may be "circumstantial evidence" that has happened, but it is not a "threshold requirement of proof."[212] When "direct evidence going to legislative purpose" suffices, "circumstantial evidence of a district's shape and demographics" is not required.[213]

An actual-conflict requirement also cannot be reconciled with *Shaw II*. The Court there rejected Justice Stevens's argument that strict scrutiny should not apply—even in the face of a predominant racial motive—as long as "'race-neutral, traditional districting criteria'" were *also* "at work."[214] Justice Stevens

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[209] *Alabama*, 135 S. Ct. at 1271 (quoting United States Amicus Br. at 19) (emphasis added).

[210] 515 U.S. 900, 910-11 (1995).

[211] *Id.* at 911.

[212] *Id.* at 913.

[213] *Id.* at 916.

[214] 517 U.S. at 907.

would have read *Shaw I*, *Bush v. Vera*,[215] and *Miller* "to require plaintiffs to prove that the State did not respect traditional districting principles in drawing majority-minority districts."[216] The majority disagreed: "That the legislature addressed these [traditional] interests does not in any way refute the fact that race was the legislature's predominant consideration."[217] The majority held that race predominated because it "was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting . . . incumbents came into play only after the race-based decision had been made."[218] The 55%-BVAP floor at issue in this case operated in exactly that way.

Similarly, *Bush* explained that race predominates when "racially motivated gerrymandering ha[s] a *qualitatively greater influence* on the drawing of district lines than politically motivated gerrymandering."[219] Racial considerations were found to have predominated there *despite* that "incumbency protection influenced the redistricting plan to an unprecedented extent."[220] The concept of "subordination" or "qualitatively greater influence" looks at whether

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[215] 517 U.S. 952 (1996).

[216] *Shaw II*, 517 U.S. at 933 (Stevens, J., dissenting).

[217] *Id.* at 907 (majority op.).

[218] *Id.*

[219] 517 U.S. at 979 (plurality) (emphasis added).

[220] *Id.* at 963.

race was a *more* important consideration than traditional factors, not at whether race contradicted or eclipsed other factors.

Intervenors are also wrong to argue that explicit racial quotas should be allowed as long as partisan politics could also explain the result.[221] The "central mandate [of the Equal Protection Clause] is racial neutrality in government decisionmaking."[222] "'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'"[223] A "racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect. This is true whether or not the reason for the racial classification is benign or the purpose remedial."[224]

Thus, even when a legislature has partisan motivations to draw voting districts to help Republicans or Democrats, its actions are subject to strict scrutiny if it uses race as the "proxy" for politics by assuming,

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[221] *See* Appellants' Br. at 29 ("[I]t is quite plausible that the BVAP resulting in Enacted District 3 directly furthers the Legislature's political interests and would be pursued absent any 'racial' motive.").

[222] *Miller*, 505 U.S. at 904.

[223] *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.)).

[224] *Shaw II*, 517 U.S. at 904-05. *See also Bush*, 517 U.S. at 996 (Kennedy, J., concurring) ("In my view, we would no doubt apply strict scrutiny if a State decreed that certain districts had to be at least 50 percent white, and our analysis should be no different if the State so favors minority races.").

for instance, that black voters overwhelmingly vote for Democratic candidates.[225] The intentional use of race in redistricting is different in kind from the use of political data that happens merely to "correlate with race."[226] Under Intervenors' theory, however, a legislature could use explicit racial quotas to pack black voters into a district to help neighboring Republicans and avoid strict scrutiny simply by arguing that the same outcome would have occurred had it used political data instead. The Equal Protection Clause does not tolerate such shortcuts. To put it bluntly, political gerrymandering may not be accomplished "by the use of race as a proxy."[227]

Tellingly, Intervenors do not cite the case that came closest to permitting racial targets *without* applying strict scrutiny, an interpretation that this Court has since renounced. In *United Jewish Organizations of Williamsburgh, Inc. v. Carey (UJO)*,[228] a divided Court rejected a challenge by Hasidic plaintiffs

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[225] *Bush*, 517 U.S. at 968 (plurality) ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.").

[226] *Id. See also Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.").

[227] *Bush*, 517 U.S. at 969. *See also id.* at 997 (Kennedy, J., concurring) ("The State may not . . . use race as a proxy to serve other interests.").

[228] 430 U.S. 144 (1977) (plurality).

who claimed that their votes were diluted by a redistricting plan that used a "65% nonwhite majority" target for majority-minority districts in order to obtain DOJ preclearance.[229] In dissent, Chief Justice Burger called that "a strict quota approach."[230] But the Court subsequently disavowed any interpretation of *UJO* that would permit a State to employ racial targets *without* satisfying strict scrutiny. As the Court explained in *Miller*, *UJO* involved a "vote dilution claim," so its analysis "does not apply to a claim that the State has separated voters on the basis of race."[231] The Court added that a State's use of racial targets in assigning voters demands strict scrutiny, notwithstanding *UJO*:

> To the extent any of the opinions in that "highly fractured decision" can be interpreted as suggesting that a State's assignment of voters on the basis of race would be subject to *anything but our strictest scrutiny*, those views ought not be deemed controlling.[232]

It would be surprising to give racial quotas in the redistricting context a free pass. This Court's

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[229] *Id.* at 152 (plurality).

[230] *Id.* at 182 (Burger, C.J., dissenting).

[231] *Miller*, 515 U.S. at 915 (citing *Shaw I*, 509 U.S. at 652).

[232] *Id.* (quoting *Shaw I*, 509 U.S. at 651) (emphasis added); *see also Bush*, 517 U.S. at 1000 (Thomas, J., joined by Scalia, J., concurring) ("Strict scrutiny applies to all governmental classifications based on race, and we have expressly held that there is no exception for race-based redistricting.").

Fourteenth Amendment jurisprudence "evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes."[233] Applying strict scrutiny to mechanical racial targets will not make redistricting more of a legal "minefield" for State legislatures, as Alabama and Texas argue.[234] To the contrary, the rule is easy for courts to administer and for States to understand. Rather than encouraging States to increase their reliance on racial quotas, the Court should send an unmistakable message that, if a racial floor is really needed, the government will be called upon to give a "sufficiently compelling justification" why.[235]

C. It was not clear error to reject Intervenors' 8-3 entrenchment claim.

Intervenors insist that the central purpose of the congressional redistricting plan was to deepen and entrench an 8-3 partisan split favoring Republicans in Virginia's eleven-member congressional delegation. Noting that black voters predominantly vote for Democrats, Intervenors argue that the fact that the BVAP increased in CD3, where Representative Bobby Scott was safely ensconced, was simply the result of politics, not race; having more black Democrats in CD3

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[233] *Bush*, 517 U.S. at 985 (plurality).

[234] Alabama Amicus Br. at 1-2.

[235] *Shaw I*, 509 U.S. at 642.

made the adjoining congressional districts safer for Republican congressmen.

That claim fails legally and factually. Even if the facts supported their 8-3 entrenchment theory, strict scrutiny would still apply when, as here, race was used to justify increasing the number of black voters in CD3. Strict scrutiny applied in *Bush*, notwithstanding the "pervasive use of race" as a "proxy to protect the political fortunes of adjacent incumbents."[236] The same is true here. *Bush* teaches that race should not be used as either the surrogate or the excuse to engineer a political outcome. As Justice Kennedy wisely wrote there, the "State may not . . . use race as a proxy to serve other interests."[237]

And even if the Constitution permitted using race as an ugly proxy for politics, the district court did not commit clear error in finding that the facts simply did not support Intervenors' 8-3 entrenchment theory. Contrary to Intervenors' hyperbole, it was not "undisputed" at trial that the purpose of the Enacted Plan was to preserve the 8-3 split,[238] nor did Janis ever say (let alone say "repeatedly") that "perpetuating

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[236] 517 U.S. at 972-73 (plurality); *see also id.* at 1000-01 (Thomas, J., joined by Scalia, J., concurring) (stating that strict scrutiny applies when the State "admits that it intentionally created majority-minority districts and that those districts would not have existed but for its affirmative use of racial demographics").

[237] *Id.* at 997 (Kennedy, J., concurring).

[238] JS 17-18.

the 8-3 split" was one of "the Enacted Plan's goals."[239] To the contrary, Janis said unequivocally that he had *not* looked at "partisan performance"; he insisted it "was not one of the factors that I considered in the drawing of the district."[240]

Intervenors emphasize that Janis said that he drew the districts "to respect to the greatest degree possible the will of the Virginia electorate as it was expressed in the November 2010 elections."[241] But the majority quite reasonably found that statement "ambiguous."[242] Two sentences later, Janis restated what he meant: that his plan respected "the will of the electorate by not cutting out currently elected congressmen from their current districts nor drawing current congressmen into districts together."[243] Avoiding the pairing of incumbents is one thing; deepening a partisan split is quite another. Even the district court told the Special Master to ensure that incumbents were not paired together in any remedial district.[244] That does not mean that Janis intentionally increased the number of Republican and Democratic voters in their respective districts for the purpose of

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[239] Appellants' Br. at 35.

[240] JA 456 (IX-9 at 14:11-13).

[241] JA 352 (PX-43 at 4:6-8).

[242] JS 33a.

[243] JA 352 (PX-43 at 4:15-18).

[244] SM Report at 23-24.

deepening the partisan divide, something Janis expressly disavowed.

Intervenors also exaggerate their own involvement in the redistricting effort to imply a factual basis for the 8-3 entrenchment theory that the record does not support. In fact, their involvement was minimal. Janis said that each congressman had approved the lines for his own district but that none had seen the entire plan.[245] According to Intervenors' own interrogatory answers, their involvement was negligible. One congressman who spoke to Janis made no mention that partisan considerations informed his comments;[246] others made no mention of even speaking to Janis;[247] one denied having any input into his plan;[248] and most disclaimed any knowledge about how the plan was actually developed.[249]

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[245] JA 353 (PX-43 at 5:24-6:6); JA 452, 456 (IX-9 at 9:6-7, 13:23-14:2).

[246] JA 316 (PX-36 at 3) (Rep. Griffith) ("I had a conversation [with Janis] regarding redistricting and stated something along the lines of 'I want my district to be as contiguous as possible and divide as few geopolitical subdivisions as possible. It would be nice if my house were in the 9th Congressional District.'").

[247] JA 338-39 (PX-39 at 1-2) (Rep. Wittman); JA 332-33 (PX-38 at 1-2) (Rep. Rigell); JA 344-45 (PX-40 at 1) (Rep. Wolf).

[248] JA 303-04 (PX-34 at 1-2) (Rep. Forbes) ("Janis asked for my feedback and comments on the redistricting plan, but I did not provide any.").

[249] JA 299 (PX-33 at 2) (Rep. Cantor) ("I do not know what materials were used, considered, consulted or created that relate to efforts by the Virginia State General Assembly to draw and adopt the 2012 Congressional Redistricting . . . ."); JA 311 (PX-35

(Continued on following page)

Given the comparatively weak evidence supporting the 8-3-entrenchment theory, the district court did not commit clear error by crediting Janis's explicit testimony that he did not look at partisan performance in drawing the plan. Intervenors credit Janis's other, more ambiguous statements as a "display of candor rarely seen" in redistricting.[250] But the majority was entitled to find Janis's explicit denial of partisan gerrymandering to be candid and, on that point, dispositive.

It is true that McDonald had written a law review article in 2012 (before his expert engagement) in which he "had determined that the intent was to create an 8-3 Republican majority."[251] Judge Payne thought that the article discredited McDonald's trial testimony.[252] But the majority found McDonald's testimony credible and believed his explanation: when he wrote the article, he had not yet read the legislative history, had not yet performed a racial bloc voting analysis, had not yet analyzed population swaps between districts, and had not yet drawn any conclusions about whether race was the predominant factor in redrawing CD3.[253]

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at 2) (Rep. Goodlatte), JA 319 (PX-36 at 6) (Rep. Griffith), JA 327 (PX-37 at 2) (Rep. Hurt), JA 334 (PX-38 at 2) (Rep. Rigell) (all same, verbatim).

[250] JS 20; Appellants' Br. at 37.

[251] JA 650 (Tr. 129:20-25).

[252] JS 48a-53a.

[253] JS 21a n.16; *see* JA 733 (Tr. 226:4-21).

As for the defense expert, the majority discounted Morgan's contrary testimony that politics explained CD3, pointing to Morgan's weaker credentials and the analytical errors exposed at trial.[254] Judge Payne, by contrast, believed Morgan.[255]

When, as here, reasonable triers of fact hearing the same evidence could have decided the case differently or formed different opinions about the credibility of the parties' respective experts, "such questions of credibility are matters for the District Court."[256] It is a mistake to "second-guess[ ] the District Court's assessment of the witnesses' testimony."[257] Credibility determinations such as these "can virtually never be clear error."[258]

D. The evidence of racial predominance distinguishes this case from *Easley*.

The evidence of racial predominance here clearly distinguishes this case from *Easley*, the principal case on which Intervenors rely. In *Easley*, there was only scant evidence that race played a material role. The Court had considered the matter once before, in *Hunt v. Cromartie*, noting that plaintiffs had "offered only

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[254] JS 21a n.16.

[255] JS 83a.

[256] *Bush*, 517 U.S. at 970 (plurality).

[257] *Id.* at 971 n.*.

[258] *Anderson*, 470 U.S. at 575.

circumstantial evidence in support of their claim"[259] and had "presented no direct evidence of intent."[260] They had focused principally on the district's shape, lack of compactness, and locality splits.[261] That evidence was insufficient on summary judgment to prove that race predominated over political considerations.[262] So the Court remanded the case for further proceedings.

On remand, the district court considered additional evidence that it found sufficient to show that race predominated,[263] but a majority of this Court again disagreed. The circumstantial evidence—"the district's shape, its splitting of towns and counties, and its high African-American voting population"—was not determinative. Because "racial identification is highly correlated with political affiliation in North Carolina," those characteristics could also have been explained by political gerrymandering.[264]

Easley found the additional, supposedly "'direct' evidence"[265] also inadequate. The redistricting leader had commented that "I think that overall [the plan] provides for a fair, geographic, *racial* and partisan

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[259] 526 U.S. at 547.

[260] *Id.* at 549.

[261] *Id.* at 547-48.

[262] *Id.* at 552.

[263] 532 U.S. at 240-41.

[264] *Id.* at 243.

[265] *Id.* at 253.

balance throughout the State of North Carolina."[266] Five Justices considered that comment insufficient to prove that race *predominated*.[267] The four dissenting Justices, by contrast, thought it adequate under the clear-error standard.[268]

The second piece of direct evidence in *Easley* was an email from a staff member to two legislators indicating that the boundary had been adjusted for members of an African-American community, but the email did "not discuss why."[269] While the majority thought that the email provided "some support" for the district court's conclusion, it was "less persuasive than the kinds of direct evidence we have found significant in other redistricting cases."[270] As examples of such direct-evidence cases, the majority cited:

- *Bush*, where the State had "conceded that one of its goals was to create a majority-minority district";

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[266] *Id.* at 253 (emphasis added).

[267] *Id.* ("We agree that one can read the statement about 'racial . . . balance' . . . to refer to the current congressional delegation's racial balance. But even as so read, the phrase shows that the legislature considered race, along with other partisan and geographic considerations; and as so read it says little or nothing about whether race played a *predominant* role comparatively speaking.").

[268] *Id.* at 266-67 & n.8 (Thomas, J., joined by Roberts, C.J., and Scalia and Kennedy, JJ., dissenting).

[269] *Id.* at 254.

[270] *Id.*

- *Miller*, where the State "set out to create [a] majority-minority district"; and
- *Shaw II*, where the plan's draftsman testified "that creating a majority-minority district was the 'principal reason' for" the challenged district.[271]

The direct evidence in this case, taken in the light most favorable to Plaintiffs, is far stronger: the General Assembly used a 55% floor to raise the BVAP in CD3 from 53.1% to 56.3%, for the avowed purpose of obtaining preclearance under § 5 by preserving a safe majority-minority district. Thus, in contrast to *Easley*, there was ample direct evidence here that race was the predominant consideration in drawing CD3.

This case is also distinguishable from *Easley* because credibility determinations played only "a minor role" there.[272] In this case, by contrast, the judges below were sharply at odds about the credibility of McDonald and Morgan. The majority credited McDonald and found Morgan not credible on the key issues of whether the legislature employed a 55%-BVAP floor and whether race, rather than politics, explained CD3; Judge Payne reached opposite conclusions about their credibility.[273]

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[271] *Id.*

[272] 532 U.S. at 243.

[273] *See supra* at 15-17, 53-54.

"The issue in this case is evidentiary."[274] The district court resolved the conflicting evidence by finding that the General Assembly imposed a 55%-BVAP floor in drawing CD3 to meet the "primary," "paramount," and "nonnegotiable" goal of avoiding retrogression. Because substantial evidence supported that conclusion, it was not clearly erroneous.

E. Plaintiffs' Alternative Plan supported their claims, though Plaintiffs were not required to submit one.

Also relying on *Easley*, Intervenors argue that Plaintiffs had the burden to introduce an alternative plan to show how the districts could have been redrawn consistent with traditional redistricting principles while bringing about greater racial balance.[275] They claim that Plaintiffs' Alternative Plan[276] failed to satisfy that alleged burden.

Assuming that Plaintiffs had that burden, they met it. The BVAP in CD3 in the Alternative Plan was 50.2%, significantly less than the 56.3% in the Enacted Plan.[277] And the majority found that the Alternative Plan "maintains a majority-minority district and achieves the population increase needed for parity, while simultaneously minimizing locality splits

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[274] *Easley*, 532 U.S. at 241.

[275] Appellants' Br. at 39.

[276] JA 257-73 (PX-29) (analysis), JA 424-26 (PX-49) (maps).

[277] JA 257, 268 (PX-29 at 1, 8).

and the number of people affected by such splits."[278] That finding was amply supported by McDonald's trial testimony.[279]

Intervenors overstate the claim that the Enacted Plan better preserved the cores of existing districts than the Alternative Plan. The Alternative Plan preserved 69.2% of the core of Benchmark CD3 compared to 83.1% under Enacted CD3. But 69.2% was not significantly worse than in Enacted CD11, which preserved 71.2% of the benchmark district.[280] Morgan conceded on cross-examination that the *total* average difference in core preservation for the Enacted Plan and the Alternative Plan across all 11 districts was only 1.5%.[281] And McDonald testified that the range of core-preservation statistics for the two plans was "substantially similar"[282] and that the difference was "not significant."[283]

The majority also properly rejected Intervenors' main criticism of the Alternative Plan—that it failed to preserve an alleged 8-3 split favoring Republicans. As shown above, the court properly rejected that

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[278] *See* JS 28a.

[279] JA 632-39 (Tr. 109-17); *see also* JA 257-73 (PX-29).

[280] JA 515-16 (IX-27); *see also* JA 794-95 (Tr. 312:2-24).

[281] JA 857 (Tr. 383:5-12).

[282] JA 887 (Tr. 420:8-9).

[283] JA 888-89 (Tr. 421:15-20).

theory, finding Intervenors' claim "overstated" and the factual premise lacking.[284]

In any case, an alternative plan is not required in a direct-evidence case like this one. An alternative plan may provide circumstantial evidence that race predominated. That the legislature *could* have accomplished its objectives without relying so much on race helps prove that it *did* rely too much on race. But circumstantial evidence is unnecessary when, as here, direct evidence proves that race predominated.

Easley is not to the contrary. As shown above, the evidence there was too weak to "show that racial considerations predominated in the drawing of the District's . . . boundaries."[285] It was in that context that the Court said:

> In a case *such as this one* where majority-minority districts . . . are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show *at the least* that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those

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[284] JS 16a n.12.

[285] 532 U.S. at 257.

> districting alternatives would have brought about significantly greater racial balance.[286]

Read in context, that passage was talking about cases with weak evidence of racial motivation (like *Easley*), not cases with *direct evidence* of racial engineering (like *Bush*, *Shaw II*, *Miller*, and this case). Without such direct evidence, a plaintiff necessarily must use other means to prove racial motivation.

Alabama also made clear that circumstantial proof is unnecessary when *direct* evidence suffices:

> We have said that the plaintiff's burden in a racial gerrymandering case is "to show, *either* through *circumstantial* evidence of a district's shape and demographics *or* more *direct* evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." [*Miller*, 515 U.S. at 916]. *Cf. Easley v. Cromartie*, 532 U.S. 234, 258 [ ] (2001) (explaining the *plaintiff's burden* in cases, *unlike these*, in which the State argues that politics, not race, was its predominant motive).[287]

The either-or formulation from *Miller* shows that either direct evidence or circumstantial evidence may suffice. And the "*Cf.*" citation to *Easley*, coupled with

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[286] *Id.* at 258 (emphasis added).

[287] 135 S. Ct. at 1267 (emphasis added).

the Court's parenthetical explanation distinguishing plaintiffs' burden in direct-evidence cases like *Alabama*, make clear that the burdens *Easley* described do not apply in direct-evidence cases like this one.

If Intervenors were right, then a plaintiff would lose a redistricting challenge, in spite of smoking-gun admissions of racial packing, simply for failing to offer an alternative plan. No alternative plan was needed to prove racial predominance in direct-evidence cases like *Shaw II*, *Miller*, and *Bush*, and none was needed here.

III. The district court did not commit clear error in finding that the use of race was not narrowly tailored to avoid retrogression.

"If race is the predominant motive in creating [a district], strict scrutiny applies, and the districting plan must be narrowly tailored to serve a compelling governmental interest in order to survive."[288] The district court ruled that compliance with § 5 was a compelling interest at the time the district was redrawn in 2012.[289]

It remains an open question if "continued compliance with § 5 remains a compelling interest" in

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[288] *Abrams v. Johnson*, 521 U.S. 74, 91 (1997) (citation omitted). *See also Hunt*, 526 U.S. at 546; *Miller*, 515 U.S. at 904, 920.

[289] JS 14a, 36a-38a.

light of *Shelby*.[290] As it has done many times before, however, the Court can assume that it is.[291] For even crediting that assumption, the use of a mechanical racial floor here was not narrowly tailored to serve that interest.

A reapportionment plan is "'not . . . narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.'"[292] "Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions."[293]

The district court did not commit clear error in concluding that Enacted CD3 flunked that test.

A. Avoiding retrogression did not require freezing or increasing the BVAP in CD3.

First, as a matter of law, the avoidance of retrogression under § 5 did not require that Virginia maintain the same percentage of black voters in CD3 as in the benchmark plan, let alone that it maintain CD3

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[290] *Alabama*, 135 S. Ct. at 1274.

[291] *E.g.*, *Abrams*, 521 U.S. at 91; *Bush*, 517 U.S. at 977 (plurality); *see also Shaw II*, 517 U.S. at 908 n.4.

[292] *Shaw I*, 509 U.S. at 655.

[293] *Bush*, 517 U.S. at 983 (plurality opinion).

as a supermajority black district. As the Court said last year in *Alabama*, § 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice."[294]

That point was not new. In 2003, all Justices agreed in *Georgia v. Aschroft*[295] that § 5 did not preclude a State from reducing the BVAP in a district, even below 50%,[296] but the Justices disagreed about the standard for evaluating retrogression. Five Justices called for evaluating "the totality of the circumstances," without focusing "solely on the comparative ability of a minority group to elect a candidate of its choice."[297] Justice Souter, writing for the four dissenting Justices, focused exclusively on ability to elect. He agreed, however, that in districts "with low racial bloc voting or significant white crossover voting, a decrease in the black proportion may have no effect at all on the minority's opportunity to elect their candidate of choice."[298] A State therefore could convert a majority-minority district into a minority-influence district as long as "minority voters will have effective influence translatable into probable election results

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[294] 135 S. Ct. at 1272.

[295] *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

[296] *Id.* at 480-85; *id.* at 498-99, 505 (Souter, J., dissenting).

[297] *Id.* at 480 (majority op.).

[298] *Id.* at 499 (Souter, J., dissenting).

comparable to what they enjoyed under the existing district scheme."[299] When Congress amended the VRA in 2006, it "adopted the views" of Justice Souter's dissent in *Aschroft*.[300]

In February 2011, weeks before Janis introduced his redistricting plan, DOJ published its Guidelines on § 5 compliance, making clear that "the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district."[301]

Thus, at the time of the redistricting at issue here, § 5 did not impose any mechanical racial floor under which the State could not reduce the percentage of black voters. In this case, as in *Alabama*, the legislature posed "the wrong question" in asking: "'How can we maintain present minority percentages in majority-minority districts?'"[302] The theory underlying that flawed premise would operate as a "one-way ratchet: the black population of a district could

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[299] *Id. See also id.* at 505 ("[T]he core holding of the Court today, with which I agree, [is] that nonretrogression does not necessarily require maintenance of existing super-majority minority districts").

[300] *Alabama*, 135 S. Ct. at 1273 (discussing *Georgia v. Ashcroft*, 539 U.S. 461 (2003)).

[301] 76 Fed. Reg. at 7,471; JA 593-94 (Tr. 62-63).

[302] 135 S. Ct. at 1274.

go up, either through demographic shifts or redistricting plans . . . [b]ut the legislature could never lower the black percentage . . . ."[303] The right question asks instead about the functional ability of minority voters to elect a candidate of choice:

> [G]iven § 5's language, its purpose, the Justice Department Guidelines, and the relevant precedent, [the legislature] should have asked: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?"[304]

In this case, there was no need for a 55%-BVAP floor, let alone the need to increase the BVAP in CD3 to 56.3%.[305] CD3 had been "a safe majority-minority district for 20 years."[306] Representative Scott, a Democrat supported by the majority of African-American voters, was winning 69.3% of the vote or more when running against Republican opponents.[307] Under

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[303] *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1340 (D. Ala. 2013) (Thompson, J., dissenting), *rev'd*, 135 S. Ct. 1257 (2015).

[304] *Alabama*, 135 S. Ct. at 1274. Rather than asking the right question, Alabama now asks this Court to hold that a 55%-BVAP floor operates as a safe harbor. Alabama Amicus Br. at 13. But that would simply trade one mechanical floor for another, neither of which is supported by a functional analysis of voting behavior.

[305] JS 9a, 20a-21a, 37a n.26, 42a.

[306] JS 40a.

[307] *Id.*; JA 204 (PX-27 at 11).

Enacted CD3, he defeated the Republican candidate in 2012 with 81.3% of the vote.[308]

That fact makes this case similar to *Bush*, where Texas's redistricting plan failed the narrow-tailoring inquiry when it increased the black population in one district from 40.8% to 50.9%. Texas showed "no basis for concluding that the increase to a 50.9% African-American population . . . was necessary to ensure nonretrogression."[309] The same is true for the BVAP increase here.

Nor was it clear error to reject the argument that the legislature might reasonably have "believed" that a 55%-BVAP floor was necessary.[310] As a matter of law, even assuming DOJ actually had a policy to deny preclearance for districts with BVAP scores under 55%, it would not justify blind obedience. Covered jurisdictions had the option to seek preclearance instead through the United States District Court for the District of Columbia.[311] Indeed, Georgia could not justify the intentional creation of a third black-majority district simply by claiming that DOJ had refused to preclear the plan without it.[312] *Miller* made clear that

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[308] JS 40a; JA 204 (PX-27 at 11).

[309] *Bush*, 517 U.S. at 983 (plurality).

[310] JS 18a n.13.

[311] *E.g.*, *Shaw I*, 509 U.S. at 635 ("Under § 5, the State remained free to seek a declaratory judgment from the District Court for the District of Columbia notwithstanding the Attorney General's objection.").

[312] 515 U.S. at 921.

VRA compliance "cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."[313] The Court flatly rejected "the contention that the State has a compelling interest in complying with whatever pre-clearance mandates the Justice Department issues."[314]

In any event, DOJ disclaimed the very position asserted by Janis, before he introduced his plan, so it was not reasonable to believe that mechanical racial floors were required.[315] Some legislators were well aware of the law. Delegate Armstrong called out Janis's plan for lacking the functional analysis needed to determine if it would "crack and pack" black voters, explaining that DOJ had not "pegged" retrogression to "a particular number."[316]

Virginia's own experience also ran counter to the notion of a 55%-BVAP floor. DOJ had precleared CD3 in 1998 with a BVAP of 50.47%.[317] And in 2011, the year before Janis's plan was adopted, DOJ precleared five of Virginia's majority-black Senate districts with BVAP percentages *less* than 55%, including one with a BVAP of 50.8%.[318]

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[313] *Id.*

[314] *Id.* at 922.

[315] 76 Fed. Reg. at 7,471; *see* JA 593-94 (Tr. 62-63).

[316] JA 389 (PX-43 at 47:4-48:1).

[317] JA 380-81 (Tr. 48:5-12); JA 427 (PX-50).

[318] JA 626-28 (Tr. 102:1-103:11); *see* JA 275 (PX-30 at 2).

So the district court could properly find that the legislature could not have formed a "reasonable belief"[319] that it was necessary to increase the number of black voters in CD3 above a 55% floor.[320] The district court was understandably concerned that accepting that claim would give States "carte blanche to engage in racial gerrymandering in the name of nonretrogression."[321]

B. The only defense witness offered no testimony on the narrow-tailoring question.

The district court also did not err in its narrow-tailoring conclusion because, quite simply, the only defense witness who testified disclaimed any position on the subject. Once Plaintiffs showed that race predominated, the burden shifted to the defense to prove that the use of race was narrowly tailored to avoid

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[319] *Abrams*, 521 U.S. at 113 (Breyer, J., dissenting).

[320] *Cf. Bush*, 517 U.S. at 983 (plurality) ("The problem with the State's argument is that it seeks to justify not maintenance, but substantial augmentation, of the African-American population percentage . . . . ").

[321] JS 39a (quoting *Shaw I*, 509 U.S. at 654).

retrogression.[322] Yet Morgan testified that he was offering *no opinion* on that topic.[323]

That admission was dispositive. The narrow-tailoring prong in a redistricting case "allows the States a limited degree of leeway" in complying with the VRA, provided the State has a "'strong basis in evidence'" to conclude that the majority-minority district "is reasonably necessary to comply" with the law.[324] There could be no "strong basis in evidence" in the absence of evidence to carry that burden.

C. Narrow tailoring cannot be shown by criticizing the Alternative Plan.

Finally, Intervenors cannot bridge the evidentiary gap in their narrow-tailoring defense by attacking *Plaintiffs'* Alternative Plan. As shown above, the evidence supported the majority's conclusion that the Alternative Plan would have met the legislature's redistricting goals while improving racial balance.

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[322] *E.g.*, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013) ("Strict scrutiny requires the [government] to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.'") (quoting *Bakke*, 438 U.S. at 305 (opinion of Powell, J.)).

[323] JA 828 (Tr. 349:16-23).

[324] *Alabama*, 135 S. Ct. at 1274; *Bush*, 517 U.S. at 977 (plurality) (quoting *Shaw I*, 509 U.S. at 656).

The Alternative Plan thus showed the *absence* of narrow tailoring.

But more importantly, "it is the government that bears the burden to prove that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate."[325] Criticizing someone else's redistricting plan does not show that the government needed to use a 55%-BVAP floor to protect black voters.

* * *

Intervenors make good arguments about their view of the evidence. We joined their arguments in the district court. But the majority of the three-judge court disagreed and resolved the factual conflicts in Plaintiffs' favor.

This case now must be assessed in light of the district court's factual findings, its credibility determinations, and the clear-error standard. That assessment mandates affirmance. Applying a 55%-BVAP floor to sweep thousands of black voters into CD3, when that was entirely unnecessary to protect their voting rights, plainly fails strict scrutiny.

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[325] *Fisher*, 133 S. Ct. at 2419 (citation and quotation omitted).

"It is a sordid business, this divvying us up by race."[326] "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin."[327] Such explicit reliance on race "threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire."[328]

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[326] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part).

[327] *Shaw I*, 509 U.S. at 657.

[328] *Id.*

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

MARK R. HERRING
Attorney General
of Virginia

CYNTHIA E. HUDSON
Chief Deputy
Attorney General

TREVOR S. COX
Deputy Solicitor General

MATTHEW R. MCGUIRE
Assistant Attorney General

STUART A. RAPHAEL*
Solicitor General
of Virginia
*Counsel of Record

900 East Main Street
Richmond, VA 23219
(804) 786-7240
sraphael@oag.state.va.us

Counsel for Virginia State Board of Elections Appellees James B. Alcorn, Clara Belle Wheeler, and Singleton B. McAllister, in their official capacities

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